Concrete Parade Sdn Bhd v Apex Equity Holdings Bhd & Ors

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02(IM)(NCC)-1551–08 OF 2019
YAACOB MD SAM, SURAYA OTHMAN AND LAU BEE LAN JJCA
18 AUGUST 2021

Companies and Corporations — Oppression — Oppression of minority — Company in which appellant was minority shareholder offered substantial number of its newly-issued shares exclusively to outsider without giving first preference of purchase to appellant — Share offer was to pay off outsider for selling its business to and merging with company's wholly-owned subsidiary — Company failed to obtain prior shareholder approval to merger exercise — Company ultra vires its constitution also bought back much of its shares in subsidiary and obtained court order to validate the buy-back — Whether company's several actions were not only breaches of the Companies Act and illegalities but severely prejudiced appellant's interests as member of the company — Whether appellant was entitled to nullify the merger exercise and reverse the share buy-back transactions

The appellant was a minority shareholder in the first respondent ('Apex Equity') which wholly owned the second respondent ('JF Apex'). Without obtaining prior shareholder approval, the companies entered into agreements for JF Apex to merge with and take over the business of the 16th respondent ('Mercury Securities'). In consideration, Mercury Securities was to be paid RM140m, inter alia, via the issuance in its favour of a substantial amount of new shares in Apex Equity and a private placement of 20 million new ordinary shares of Apex Equity by the ninth to 15th respondents who were selected by Mercury Securities for the merger exercise. Between 2005 and 2017, Apex Equity (whose directors at the material time were the third to the eighth respondents) undertook numerous transactions to buy back its shares in JF Apex. When the appellant pointed out that the transactions were not authorised by the company's constitution, Apex Equity obtained a court order to validate the transactions. The appellant brought a minority oppression action under s 346 of the Companies Act 2016 ('the CA') to: (a) nullify all agreements pertaining to the merger exercise on the ground that they breached ss 85 and 223 of the CA for denying the appellant of its statutory pre-emptive right to be offered the new shares in Apex Equity and for not obtaining prior shareholders' approval to the merger exercise; and (b) set aside the court order validating the 2005–2017 share buy-back transactions on the ground that the court could not validate a breach of s 67(1) and/or s 123 of the CA. The instant appeal was against the High Court's dismissal of the appellant's action.

Held, unanimously allowing the appeal and setting aside the High Court's decision: A

(1) Premised on a reading of s 85(1) of the CA and article 11 of the memorandum and articles of association ('M & A'), the appellant had a statutory and contractual pre-emptive right to be offered the new shares in Apex Equity. The appellant could not be denied of that right unless there was 'direction to the contrary' given during a general meeting prior to such new shares being offered to outsiders (see para 20). B

(2) No resolution passed at a general meeting could displace the appellant's pre-emptive right to be offered the new shares as was sought to be done via the subscription agreements. In any event, the placement resolution passed at Apex Equity's EGM on 19 June 2019 could not constitute a 'direction to the contrary' because: (a) a 'direction to the contrary' had to be obtained before any shares were offered to outsiders. Since the placement resolution was passed after the execution of the subscription agreements offering the placement shares to the 9th to the 15th respondents, it could not retrospectively allow for the issuance of new shares to outsiders in breach of s 85 of the CA; and (b) for a 'direction to the contrary' to be operative, the proposed resolution had to set out all the requisite information regarding the shareholders' pre-emptive rights under s 85(1) of the CA, namely: (i) that the existing shareholders had a statutory pre-emptive right to be offered any new shares which ranked equally to existing shares issued by Apex Equity; (ii) that by voting in favour of the resolution for the issuance of the placement shares, the shareholders would be waiving their statutory pre-emptive right; and (iii) that the placement resolution could not be relied upon to suggest a waiver of express statutory rights because a waiver by election was only valid if the party electing had knowledge of his legal rights and with that knowledge consciously chose not to exercise the same (see paras 23–24 & 55). C D E F G

(3) There was no merit in the argument that the placement resolution did not have to specifically state the proposed waiver of the existing shareholders' pre-emptive rights since they would have been aware of the likelihood that their shares would be diluted if they approved the resolution. The placement resolution could not displace the appellant's statutory pre-emptive rights to the placement shares which breach was oppressive because it resulted in: (a) the unjustified dilution of the appellant's shareholding in Apex Equity because an additional 20 million new shares were issued to outsiders despite the statutory safeguard in s 85 of the CA (where the legislative intent was 'to maintain the relative voting and distribution rights of those shareholders'); and (b) the loss of the appellant's opportunity to enhance its shareholding in Apex Equity by subscribing for part of the placement shares. The general power given to H I

directors under s 75 of the CA to allot shares could not be used to by-pass the safeguards under s 85 of the CA. The invalid offer and issuance of the placement shares under the subscription agreements therefore constituted an unfairly prejudicial conduct within the meaning of s 346 of the CA. The appellant was oppressed given that there had been an unjustified dilution of its shareholding in Apex Equity since the placement shares had been offered to outsiders (see paras 25, 27 & 29–31).

(4) The passing of the Merger Resolution on 19 June 2019 after the event and subsequent to the breaches of s 223 of the CA could not cure the breaches. Since the heads of agreement ('HOA'), which was completed on 18 December 2018, did not contain a condition precedent for shareholder approval to be obtained, the Merger Resolution could not ex post facto allow for the inclusion of such condition precedent after the completion of the HOA. Secondly, the business merger agreement (BMA) required prior shareholder approval before it was executed on 18 December 2018. Therefore, a shareholder approval via the merger resolution obtained six months later on 19 June 2019 could not cure this transgression which had already occurred (see para 53).

(5) The denial of the appellant's fundamental statutory right under s 223 of the CA to vote and approve the merger exercise prior to the execution of the BMA constituted oppression on the minority irrespective of whether such vote would have changed the outcome of the merger resolution. The denial of the appellant's right to vote assumed greater significance when the merger exercise, although framed as an acquisition of Mercury Securities, was instead to facilitate a covert reverse take-over of Apex Equity and its subsidiaries (including JF Apex) by Mercury Securities and its MD, Chew Sing Guan. The merger would ultimately have resulted in Mercury Securities: (a) becoming the single largest shareholder in Apex Equity holding about 31% of the company's enlarged share capital; (b) if taken in conjunction with the proposed placement to the 9th to 15th respondents (constituting about 6.2% of the company's enlarged share capital), controlling about 37.2% of Apex Equity's enlarged share capital; and (c) having complete control over Apex Equity's group of companies as its MD, Chew Sing Guan, would have the sole discretion to appoint the entire board of directors of the company's subsidiaries including JF Apex (see para 59).

(6) The merger would have resulted in Mercury Securities not only receiving RM140m for the sale of its business but also gaining absolute control over Apex Equity's group of companies and control of approximately 37% without having to comply with rule 4.01 of the Rules on Take-Overs, Mergers and Compulsory Acquisitions. These consequences unfairly prejudiced the appellant as a member of the company because

the value of its investments in Apex Equity would have diminished substantially not only by the loss of the purchase consideration of RM140m to Mercury Securities but also by the ceding of control of Apex Equity to Mercury Securities where the company's shareholders would no longer be in a position to manage and structure the company and its group (see paras 60–61).

(7) The act of the directors of Apex Equity in filing the validation proceedings without first amending the company's constitution was a blatant disregard of its M & A and was oppressive to the appellant. The directors' failure to obtain the consent and authority of the shareholders for the filing of the validation proceedings denied the appellant of the opportunity to participate in the said proceedings and to inform the court that: (a) it had no jurisdiction to validate the transactions on account of the fact that they were unlawful/illegal; and (b) that the affairs of the company were being conducted in a manner prejudicial to and/or in disregard of the appellant's interests as a member of the company (see paras 67–68).

(8) There was no acquiescence or inordinate delay on the appellant's part to disentitle it from applying to set aside the validation order. There could not be any acquiescence against a breach of statute or an illegal act which, in effect, was the substance of the validation order. There was also no inordinate delay as the relevant cause papers were not served on the appellant and there was about a month's delay of the public announcement of the validation order (see paras 69–70).

[Bahasa Malaysia summary

Perayu merupakan pemegang saham minoriti dalam responden pertama ('Apex Equity') yang memiliki sepenuhnya responden kedua ('JF Apex'). Tanpa mendapat kelulusan pemegang saham terlebih dahulu, syarikat-syarikat memeterai perjanjian untuk JF Apex bergabung dengan dan mengambil alih perniagaan responden ke-16 ('Mercury Securities'). Sebagai balasan, Mercury Securities perlu dibayar RM140 juta, antara lain, melalui terbitan berpihak kepada sejumlah besar saham baharu dalam Apex Equity dan tawaran persendirian sebanyak 20 juta saham biasa baharu Apex Equity oleh responden ke-9 hingga ke-15 yang telah dipilih oleh Mercury Securities untuk usaha penggabungan. Antara tahun 2005 dan 2017, Apex Equity (yang mana pengarahnya pada masa material adalah responden ke-3 hingga ke-8) melakukan banyak transaksi untuk membeli balik sahamnya dalam JF Apex. Apabila perayu menegaskan bahawa urus niaga tersebut tidak diluluskan oleh perlembagaan syarikat, Apex Equity memperoleh perintah mahkamah untuk mengesahkan transaksi tersebut. Perayu membawa tindakan penindasan minoriti di bawah s 346 Akta Syarikat 2016 ('AS') untuk: (a) membatalkan kesemua perjanjian yang berkaitan dengan usaha penggabungan atas alasan bahawa ia melanggar ss 85 dan 223 AS kerana menafikan perayu hak beli

dahulu statutori beliau untuk ditawarkan saham baharu dalam Apex Equity dan kerana tidak mendapatkan kelulusan pemegang saham terdahulu untuk usaha penggabungan; dan (b) mengetepikan perintah mahkamah yang mengesahkan urus niaga beli balik saham 2005-2017 atas alasan bahawa mahkamah tidak dapat mengesahkan pelanggaran s 67(1) dan/atau s 123 AS. Rayuan semasa adalah terhadap penolakan Mahkamah Tinggi terhadap tindakan perayu.

Diputuskan, sebulat suara membenarkan rayuan dan mengetepikan keputusan Mahkamah Tinggi:

(1) Berdasarkan pembacaan s 85(1) AS dan perkara 11 memorandum dan perkara persatuan ('M & A'), perayu mempunyai hak beli dahulu statutori dan kontrak untuk ditawarkan saham dalam Apex Equity. Perayu tidak boleh dinafikan hak tersebut melainkan terdapat 'arahan sebaliknya' yang diberikan semasa mesyuarat agung sebelum saham baharu tersebut ditawarkan kepada pihak luar (lihat perenggan 20).

(2) Tiada ketetapan yang diluluskan dalam mesyuarat agung boleh menggantikan hak beli dahulu perayu untuk ditawarkan saham baharu seperti yang dikehendaki dilakukan melalui Perjanjian Langganan. Walau apapun, resolusi tawaran yang diluluskan pada EGM Apex Equity pada 19 Jun 2019 tidak boleh membentuk 'arahan sebaliknya' kerana: (a) 'arah sebaliknya' perlu diperolehi sebelum sebarang saham ditawarkan kepada pihak luar. Memandangkan resolusi tawaran telah diluluskan selepas pelaksanaan Perjanjian Langganan yang menawarkan penempatan saham kepada responden ke-9 hingga ke-15, ia tidak boleh secara retrospektif membenarkan penerbitan saham baharu kepada pihak luar yang melanggar s 85 AS; dan (b) untuk 'arahan sebaliknya' berkuat kuasa, ketetapan yang dicadangkan perlu menyatakan semua maklumat yang diperlukan mengenai hak beli dahulu pemegang saham di bawah s 85(1) AS, iaitu: (i) bahawa pemegang saham sedia ada mempunyai hak beli dahulu statutori untuk ditawarkan mana-mana saham baharu yang mempunyai kedudukan yang sama dengan saham sedia ada yang diterbitkan oleh Apex Equity; (ii) bahawa dengan mengundi memihak kepada ketetapan penerbitan penempatan saham, pemegang saham akan mengetepikan hak beli dahulu statutory mereka; dan (iii) bahawa resolusi tawaran tidak boleh digunapakai untuk mencadangkan pelepasan hak statutori yang nyata kerana pelepasan melalui undian hanya sah sekiranya pihak yang memilih mempunyai pengetahuan tentang hak undang-undangnya dan dengan pengetahuan tersebut secara sedar memilih untuk tidak melaksanakannya (lihat perenggan 23, 24 dan 55).

(3) Tiada merit dalam hujah bahawa resolusi tawaran tidak perlu menyatakan secara khusus cadangan pelepasan hak beli dahulu pemegang saham sedia ada kerana mereka akan menyedari kemungkinan

saham mereka akan dicairkan sekiranya mereka meluluskan ketetapan tersebut. Resolusi Tawardan tidak boleh menggantikan hak beli dahulu statutori perayu kepada penempatan saham yang pelanggarannya adalah menindas kerana ia mengakibatkan: (a) pencairan pegangan saham perayu yang tidak wajar dalam Apex Equity kerana tambahan 20 juta saham baharu telah diterbitkan kepada pihak luar walaupun perlindungan statutori dalam s 85 AS (di mana niat perundangan adalah 'untuk mengekalkan hak mengundi dan pengagihan relatif pemegang saham tersebut'); dan (b) kehilangan peluang perayu untuk meningkatkan pegangan sahamnya dalam Apex Equity dengan melanggan sebahagian daripada penempatan saham. Kuasa am yang diberikan kepada pengarah di bawah s 75 AS untuk memperuntukkan saham tidak boleh digunakan untuk mengatasi perlindungan di bawah s 85 AS. Oleh itu, tawaran dan pengeluaran penempatan saham yang tidak sah di bawah Perjanjian Langganan merupakan kelakuan yang tidak adil yang memprejudis dalam pengertian s 346 AS. Perayu telah ditindas memandangkan terdapat pencairan yang tidak wajar dalam pegangan sahamnya dalam Apex Equity sejak penempatan saham telah ditawarkan kepada pihak luar (lihat perenggan 25, 27, 29–31).

(4) Kelulusan Ketetapan Penggabungan pada 19 Jun 2019 selepas peristiwa tersebbut dan selepas pelanggaran s 223 AS tidak dapat mengatasi pelanggaran tersebut. Memandangkan Kepala Perjanjian ('HOA'), yang disempurnakan pada 18 Disember 2018, tidak mengandungi syarat duluan untuk kelulusan pemegang saham diperoleh, Ketetapan Penggabungan tidak boleh ex post facto membenarkan kemasukan syarat tersebut selepas menyelesaikan HOA. Kedua, Perjanjian Penggabungan Perniagaan (BMA) memerlukan kelulusan pemegang saham terlebih dahulu sebelum ia dilaksanakan pada 18 Disember 2018. Oleh itu, kelulusan pemegang saham melalui Ketetapan Penggabungan yang diperoleh enam bulan kemudian pada 19 Jun 2019 tidak dapat mengatasi pelanggaran yang telah berlaku (lihat perenggan 53).

(5) Penafian hak asas statutori perayu di bawah s 223 AS untuk mengundi dan meluluskan usaha penggabungan sebelum pelaksanaan BMA membentuk penindasan ke atas minoriti tanpa mengira sama ada undi tersebut akan mengubah keputusan Ketetapan Penggabungan. Penafian hak perayu untuk mengundi dianggap lebih penting apabila usaha penggabungan, walaupun dirangka sebagai pemerolehan Mercury Securities, sebaliknya untuk memudahkan pengambilalihan terbalik secara rahsia Apex Equity dan anak-anak syarikatnya (termasuk JF Apex) oleh Mercury Securities dan MDnya, Chew Sing Guan. Penggabungan akhirnya akan menyebabkan Mercury Securities (i) menjadi pemegang saham tunggal terbesar dalam Apex Equity yang memegang kira-kira 31% daripada modal saham syarikat yang diperbesarkan (ii) jika diambil bersama-sama dengan cadangan tawaran kepada responden ke-9 hingga

ke-15 (membentuk kira-kira 6.2% daripada modal saham syarikat yang dilanjutkan), mengawal kira-kira 37.2% daripada modal saham Apex Equity yang dilanjutkan, dan (iii) mempunyai kawalan penuh ke atas kumpulan syarikat Apex Equity kerana MDnya, Chew Sing Guan, akan mempunyai budi bicara mutlak untuk melantik keseluruhan lembaga pengarah anak syarikat syarikat termasuk JF Apex (lihat perenggan 59).

(6) Penggabungan tersebut akan menyebabkan Mercury Securities bukan sahaja menerima RM140 juta untuk penjualan perniagaannya tetapi juga mendapat kawalan mutlak ke atas kumpulan syarikat Apex Equity dan kawalan kira-kira 37% tanpa perlu mematuhi Peraturan 4.01 Peraturan Pengambilan, Penggabungan dan Pengambilalihan Wajib. Kesan ini secara tidak adil menjejaskan perayu sebagai ahli syarikat kerana nilai pelaburannya dalam Apex Equity akan berkurangan dengan ketara bukan sahaja dengan kehilangan balasan pembelian RM140 juta kepada Mercury Securities tetapi juga oleh penyerahan kawalan Apex Equity kepada Mercury Securities di mana pemegang saham syarikat tidak lagi berada dalam kedudukan untuk mengurus dan menstruktur syarikat dan kumpulannya (lihat perenggan 60–61).

(7) Tindakan pengarah Apex Equity memfailkan prosiding pengesahan tanpa meminda perlembagaan syarikat terlebih dahulu adalah pengabaian M&Anya secara terang-terangan dan menindas perayu. Kegagalan pengarah untuk mendapatkan persetujuan dan kuasa pemegang saham untuk memfailkan prosiding pengesahan telah menafikan perayu peluang untuk mengambil bahagian dalam prosiding tersebut dan memaklumkan kepada mahkamah bahawa: (i) ia tidak mempunyai bidang kuasa untuk mengesahkan urus niaga dengan mengambil kira fakta bahawa ia adalah menyalahi undang-undang/tidak sah; dan (ii) bahawa hal ehwal syarikat dijalankan dengan cara yang memudaratkan dan/atau tidak mengambil kira kepentingan perayu sebagai ahli syarikat (lihat perenggan 67–68).

(8) Tiada penerimaan atau kelewatan yang melampau di pihak perayu untuk membatalkan haknya daripada memohon untuk mengetepikan perintah pengesahan tersebut. Tidak boleh ada sebarang penerimaan terhadap pelanggaran statut atau perbuatan menyalahi undang-undang yang, sebenarnya, adalah intipati perintah pengesahan. Ia juga tiada kelewatan yang melampau kerana kertas kausa yang berkaitan tidak disampaikan kepada perayu dan terdapat kelewatan kira-kira sebulan bagi pengumuman awam perintah pengesahan (lihat perenggan 69–70).]

Cases referred to

A company (No 005134 of 1986), Re, ex parte Harries [1989] BCLC 383, Ch D (refd)

Australian Securities Commission v Multiple Sclerosis Society of Tasmania (1993) 10 ACSR 489, SC (refd)
Daiman Development Sdn Bhd v Mathew Lui Chin Teck & anor appeal [1981] 1 MLJ 56, PC (refd)
Fowler v Gruber [2010] 1 BCLC 563 (refd)
Great Eastern Hotel (Pte) Ltd, Re [1988] 1 SLR 841; [1988] 2 SLR (R) 276, HC (refd)
Holman et Al' v Johnson, alias Newland (1775) 98 ER 1120 (refd)
Howard Smith Ltd v Ampol Petroleum Ltd and others [1974] AC 821, PC (folld)
Joan Fung @ Joan Fung Nyuk Lee v Allianz General Insurance Co (M) Bhd [2011] 6 MLJ 805, HC (refd)
Jones and others and Minister for Immigration and Citizenship, Re (2009) 106 ALD 564 (distd)
Leathley v John Fowler & Company Limited [1946] KB 579, CA (refd)
Lee Yee Wuen v Lee Kai Wuen & Ors [2020] MLJU 1902, CA (refd)
Lim Hean Pin v Thean Seng Co Sdn Bhd & Ors [1992] 2 MLJ 10, HC (refd)
Lim Keng Siong & Anor v Yeo Ah Tee [1983] 2 MLJ 39, FC (refd)
Little Olympian Each-Ways Ltd (No 3), Re [1995] 1 BCLC 636, Ch D (refd)
PJD Regency Sdn Bhd v Tribunal Tuntutan Pembeli Rumah & Anor and other appeals [2021] 2 MLJ 60; [2021] 2 CLJ 441, FC (refd)
Pan-Pacific Construction Holdings Sdn Bhd v Ngiu-Kee Corp (M) Bhd & Anor [2010] MLJU 269, FC (refd)
Paragon Union Bhd v Prestamewah Development Sdn Bhd & Anor and another appeal [2018] 4 MLJ 307, CA (refd)
Peyman v Lanjani [1985] Ch 457, CA (distd)
Pioneer Haven Sdn Bhd v Ho Hup Construction Co Bhd & Anor and other appeals [2012] 3 MLJ 616, CA (refd)
Seah Eng Toh Daniel & Anor v Kingsley Khoo Hoi Leng & 3 Ors [2015] MLJU 2353, HC (folld)
Shanti Prasad Jain v Kalinga Tubes Ltd And Ors AIR 1962 Ori 202, HC (refd)
Smithton Ltd (formerly Hobart Capital Markets Ltd) v Naggar [2015] 1 WLR 189, CA (refd)
Soo Boon Siong @ Saw Boon Siong v Saw Fatt Seong and Soo Hock Seang (as estate representative Soo Boon Kooi@ Saw Boon Kooy (deceased)) & Ors [2008] 1 MLJ 27, CA (refd)
Sri Kelangkota-Rakan Engineering JV Sdn Bhd & Ors v Arab-Malaysian Prima Realty Sdn Bhd & Ors [2001] 1 MLJ 324, CA (refd)
Von Hatzfeldt-wildenburg v Alexander [1912] 1 Ch 284, Ch D (refd)

Legislation referred to

Capital Markets and Services Act 2007
Companies Act 1956 [IN] s 81
Companies Act 1965 (repealed by Companies Act 2016) ss 67, 67(1), 67A, 132C, 132C(1)
Companies Act 2006 [UK] s 190

Companies Act 2016 ss 75, 85, 85(1), 123, 123(1), 127, 223, 223(1), (1)(b)(i), (1)(b)(ii), 233, 346, 346(2), 582, 582(3)
Corporations Law [AU] s 260
Employees Provident Fund Act 1951 ss 9, 47

Appeal from: Originating Summons No WA-24NCC-56–02 of 2019 (High Court, Kuala Lumpur)

Cyrus Das (Alvin Tang, Khor Heng How, Fiona Bodipalar and Abigail Nimbalker with him) (Bodipalar Ponnudurai De Silva) for the appellant.
Rabindra S Nathan (Mak Lin Kum, R Himahlini and Lyness Lim Wei Xeng with him) (Himahlini & Loh) for the first, second and 16th respondents.
Kennie Ang Joo Koon (Yin Yin with him) (Ivan Lau & Xuen) for the third, fourth and fifth respondents.
Wong Kah Hui (Ong Jian Nee with him) (KH Wong & Co) for the sixth and seventh respondents.
Richard WG Lee (Elizabeth Goh Huay Ling and Soon Jia Yee with him) (Jeff Leong, Poon & Wong) for the eighth respondent.
Shim De Zhen (Hazwan Lee bin Haris Lee with him) (Yeoh Shim Siow & Lay Kuan) for the ninth and 12th respondents.
Yuvaraj Sugapathy (Sugapathy & Partners) for the tenth respondent.
Tan Eng Keat (Gan, Lee & Tan) for the 11th respondent.
Yee Jun Hong (Frederick Teng Siaw Chuing with him) (JH Yee & Co) for the 13th respondent.
N Nathan (Shahman with him) (Kumar Jaspal Quah & Aishah) for the 14th respondent.
Jasvinder Singh (Asyraf, Vivek & Wee) for the 15th respondent.

Lau Bee Lan JCA:

INTRODUCTION

[1] This is the appellant's appeal against the dismissal of the appellant's oppression suit under s 346 of the Companies Act 2016 (Act 777) ('the CA 2016') via an amended originating summons dated 20 February 2019 ('the OS') with cumulative costs of RM415,000.

[2] The appellant's complaints revolved around:

(a) the proposed merger exercise pertaining to the acquisition and/or of the 16th respondent ('Mercury Securities') with the second respondent ('JF Apex') involving a contravention of s 85 and s 223 of the CA 2016; and

(b) the validation proceedings ie the proceedings commenced by the first respondent ('Apex Equity') to validate previous share buy-back transactions undertaken from 2005 to 2017 which are in contravention of s 67(1) and/or s 123(1) of the CA 2016.

[3] The relief sought in the OS includes declaratory reliefs and orders to:

(a) nullify all the agreements executed in respect of the proposed merger exercise; and

(b) reverse all the previous share buy-back transactions and the purported validation exercise which were carried out in contravention of written laws.

SALIENT FACTS

[4] The salient undisputed facts relevant to this appeal are gleaned from the learned High Court judge's ('the judge') grounds of judgment and the submissions. The first respondent, Apex Equity is a public listed company. And is principally engaged in the business of investment holding and trading in marketable securities. The second respondent, JF Apex is a wholly owned subsidiary of Apex Equity. The 16th respondent, Mercury Securities is a private limited company and is principally engaged in the business of stockbroking and corporate advisory. The appellant is a shareholder holding 10,000,000 ordinary shares in Apex Equity amounting to approximately 4.68% of the total shares (inclusive of treasury shares) of Apex Equity.

[5] The appellant brought an action against the respondents for minority oppression under s 346 of the CA 1965. To reiterate, the appellant's complaint of oppression stems from two sets of transactions: (a) certain share buy-back transactions that had been conducted by Apex Equity between 2005 and 2017; and (b) proposed merger exercise between JF Apex and Mercury Securities carried out via the merger agreements comprising: (i) the heads of agreement ('HOA') and the business merger agreement ('BMA') and the subscription agreements. The HOA is the heads of agreement dated 21 September 2018 between Apex Equity and Mercury Securities, for the merger and transfer of the business of Mercury Securities to JF Apex via the BMA and the subscription agreements.

[6] Apex Equity and JF Apex entered into the BMA with Mercury Securities on 18 December 2018. The consideration for the business transfer is RM140m which will be paid in the following manner:

(a) a sum of RM92m shall be paid by the issuance of RM100m new ordinary shares of Apex Equity to Mercury Securities at an issue price of RM0.92 per share; and

A (b) the balance of RM48m shall be paid in cash and partly funded by the proposed private placement of 20,000,000 new ordinary shares of Apex Equity, which shall generate proceeds in the sum of RM18.8m.

B **[7]** The HOA, BMA and the subscription agreements are conditional agreements subject to the approval of the shareholders. It is common ground that these agreements were executed without the prior approval of Apex Equity's shareholders.

C **[8]** On 20 February 2019 the OS was filed.

[9] On 31 May 2019, Apex Equity issued a notice of extraordinary general meeting to be held on 19 June 2019 ('the merger EGM') to deliberate on two resolutions ie: (a) the approval of the proposed merger exercise pursuant to the D terms of the BMA ('the merger resolution'); and (b) the approval of the proposed private placement ('the placement resolution').

[10] On 3 June 2019, Apex Equity issued a shareholder' circular in respect of the merger EGM.

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[11] On 19 June 2019, the merger resolution and the placement resolution were passed by a vote of 54.8% to 45.2%.

F **[12]** For the proposed private placement, Apex Equity entered into a subscription agreement on 18 December 2018 with the ninth to 15th respondents ('the placees'). The third to eighth respondents were the directors of Apex Equity at the material time.

G **[13]** Between 2005 and 2007, Apex Equity had undertaken numerous share buy-back transactions pursuant to mandates and approvals given by its shareholders at the respective annual general meetings.

[14] It was the appellant who had brought to the attention of the first to H eighth respondents as to the issue of lack of authority. On 22 May 2018, the appellant through its solicitors Messrs Bodipalar Ponnudurai De Silva had informed several of Apex Equity's directors that there might be a possible lack of authority under the company's M&A to carry out share buy-back. The Board of Directors of Apex Equity tabled resolutions at the company's AGM I on 28 May 2018 to seek a further mandate to conduct share buy-back transactions. Based on the Minutes of the 2018 AGM, the shareholders voted against any mandate for further share buy-back transactions and also rejected the resolution to authorise the directors to allot new shares not exceeding 10% of the company's issued share capital.

[15] On 13 July 2018, Apex Equity filed the Validation Proceedings to validate the previous share buy-back transactions conducted from 2005–2017.

[16] On 29 August 2018, the High Court granted the validation order in respect of the Validation Proceedings.

[17] Apex Equity only made public announcement of the existence of the validation order on 26 September 2018 approximately one month after the validation order was obtained.

HIGH COURT DECISION

[18] The reasons for the dismissal of the OS as succinctly summarised by the learned judge in his grounds of judgment are as follows:

> (a) in relation to the share buy-back transaction: although I accept that the plaintiff may have been deprived of an opportunity to raise its objections at the validation proceedings, I was of the view that, on the facts of this case, none of its substantive rights as a shareholder in Apex Equity had been materially prejudiced;
>
> (b) in relation to the contention of breach of the shareholders' statutory right or pre-emption under section 85 of the Companies Act 2016;
>
> (i) there had not been any contravention of the rights of pre-emption, due to the fact that the proposed placement had been approved by the shareholders of Apex Equity at its general meeting held on 20 June 2019; and
>
> (ii) it was not necessary for the circular to the shareholders of Apex Equity to expressly specify that approving the proposed acquisition of Mercury's business would amount to a waiver or the shareholders' right of pre-emption, because any reasonably incumbent shareholder would have understood that a private placement must necessarily have the effect of diluting that shareholder's interest in Apex Equity. Put another way, the failure to use a specific forms of words denoting the waiver of a right of pre-emption could not amount to an act of oppression, for as long as the effects of the transaction being proposed were made reasonably clear to the shareholders of Apex Equity; and
>
> (c) on the proper construction of section 223(1), it suffices if either:
>
> (1) a substantial transaction had been approved by the company in general meeting prior to the entry of the transaction; or
>
> (2) the documentation recording the substantial transaction specifies shareholders' approval as a condition precedent.
>
> On the facts of the present case, because the Business Merger Agreement specified shareholders' approval as a condition precedent to completion of the proposed acquisition of Mercury's business, there had been no contravention of section 223(1);

(i) on the true construction of section 223(1), an agreement or transaction is only subject to shareholders' approval if it has the effect of creating enforceable obligations on a company to either acquire an asset of substantial value or to dispose a substantial portion of its assets. On the facts of the present case, even though the Heads of Agreement was expressed to be legally binding, it did not have the effect of committing the parties to the sale and purchase of the business, and was thus not subject to the requirement for shareholders' approval under section 223(1); and

(ii) even if the Heads of Agreement was in contravention of section 223(1), it is had been superseded by the Business merger agreement, which in turn has been made subject to shareholders' approval, and hence was in compliance with section 223(1). The Heads of agreement thus no longer has any force or effect, and accordingly the question of whether the Heads of Agreement was void was academic; and

(iii) in any event, I was not satisfied that the plaintiff had demonstrated any prejudice to its rights as shareholder in order to avail itself of the remedies under section 346 of the Companies Act 2016.

GROUNDS OF APPEAL

[19] Broadly, the appellant submits that in dismissing the OS, the learned judge misdirected himself in failing to hold that:

(a) the merger agreements are in breach of the CA 2016 namely:

(i) the subscription agreements are in breach of s 85 of the CA 2016 which provides that the appellant with a statutory pre-emptive right to be offered any new shares in Apex Equity; and

(ii) the HOA and the BMA are in breach of s 223 of the CA 2016 which requires prior shareholders' approval before the carrying into effect of the proposed merger exercise.

(b) the validation proceedings are in breach of s 67(1) of the CA 1965 and/or s 123(1) of the CA 2016 which prohibits Apex Equity from purchasing its own shares without authorisation in the memorandum and articles of association of Apex Equity ('M&A').

DENIAL OF STATUTORY AND CONTRACTUAL PRE-EMPTIVE RIGHTS

[20] We are of the considered view that the appellant has a statutory and contractual pre-emptive right to be offered new shares in Apex Equity premised on a reading of:

(i) s 85(1) of the CA 2016 which provides:

(1) Subject to the constitution, *where a company issues shares which rank*

> *equally to existing shares as to voting or distribution rights, those shares shall first be offered to the holders of existing shares* in a manner which would, if the offer were accepted, maintain the relative voting and distribution rights of those shareholders; (Emphasis added.) with

(ii) article 11 of the M&A which states:

> *Subject to any direction to the contrary* that may be given by the Company in general meeting, *all new shares or other convertible securities shall be offered to such persons as at the date of the offer are entitled to receive notices from the Company of general meetings* in proportion, as nearly as the circumstances admit, to the amount of the existing shares to which they are entitled ... (Emphasis added.)

We further hold that the appellant cannot be denied its pre-emptive right unless there is 'direction to the contrary' given during a general meeting, prior to such new shares being offered to outsiders.

[21] The respondents argue there is allegedly no breach of s 85 of the CA 2016 by contending the following:

(a) the placement resolution passed at Apex Equity's EGM on 19 June 2019 subsequent to the execution of the subscription agreements on 18 December 2018 constitutes a direction to the contrary; and

(b) s 75 of the CA 2016 grants directors the power of allotment in respect of the placement shares.

DIRECTION TO THE CONTRARY

[22] The learned judge held the view that 'the resolution passed by the company in general meeting approving the business (which included the proposed placement as part of it) amounted to a 'direction to the contrary that may be given by the Company in general meeting' for the purposes and within the meaning of article 11' (para 47 grounds of judgment) and para 18 above. We respectfully disagree with this finding of the learned judge for the reasons below.

[23] The appellant submits that the placement resolution passed at Apex Equity's EGM cannot in law constitute a 'direction to the contrary' because the words 'subject to any direction to the contrary' under s 85 of the CA 2016 does not entitle a full waiver of the shareholders 'pre-emptive rights'. In support thereof the appellant relies on *Shanti Prasad Jain v Kalinga Tubes Ltd and Ors* AIR 1962 Ori 202 wherein the Indian High Court at p 208 held that the equivalent Indian section of s 81 of the Companies Act 1956 'in the allotment of new shares does not contemplate total exclusion of the existing shareholders from participating; the clause 'subject to any directions to the contrary' can

only refer to the manner and proportion in which the shares have to be offered to the existing shareholders'. Thus we find there is merit in the submission of the appellant that no resolution passed at a general meeting can completely displace the appellant's pre-emptive rights in the new shares as was sought to be done via the subscription agreements.

[24] In any event we agree with the submission of the appellant that-on the facts of the appeal before us, the placement resolution cannot constitute a 'direction to the contrary' for the following reasons:

(a) a 'direction to the contrary' must be obtained before any shares are offered to outsiders. However, in the appeal before us, the undisputed fact is that the placement resolution was passed after the execution of subscription agreements where the offer of the placement shares to the seven placees (ninth to 15th respondents). Thus, the placement resolution cannot retrospectively allow the issuance of new shares to outsiders in breach of s 85 of the CA 2016.

(b) for a 'direction to the contrary' to be operative, the proposed resolution must set out all the requisite information regarding the shareholders' pre-emptive rights under s 85(1) of the CA 2016 ie:

(i) the existing shareholders had a statutory pre-emptive right to be offered any new shares which rank equally to existing shares issued by Apex Equity read together with article 11 of the M&A;

(ii) by voting in favour of the resolution for the issuance of the placement shares, the shareholders of Apex Equity would be waiving their statutory pre-emptive right; and

(iii) the placement resolution cannot be relied upon to suggest a waiver of express statutory rights because a waiver by election is only valid if the party electing had knowledge of his legal rights and with that knowledge consciously chose not to exercise the same. In this regard we rely on the English Court of Appeal decision in *Peyman v Lanjani* [1985] Ch 457 at p 487 which applied another decision of the court in *Leathley v John Fowler & Company Limited* [1946] KB 579.

[25] In addition, the respondents attempt to suggest that the placement resolution does not have to specifically state the proposed waiver of the existing shareholders pre-emptive rights because the shareholders would be aware of the likelihood of the dilution if they approved the resolution. The respondents rely on *Re Jones and others and Minister for Immigration and Citizenship* (2009) 106 ALD 564 and *Re Great Eastern Hotel (Pte) Ltd* [1988] 1 SLR 841; [1988] 2 SLR (R) 276 in support of their proposition. In fact, the learned judge agreed

with the aforesaid argument as we have alluded in para 18 above (see also paras 48–49(a), grounds of judgment). A

[26] We are of the view that the cases of *Re Jones* and *Re Great Eastern Hotel* are of no assistance to support the proposition canvassed by the respondents as they were decided on a completely different factual matrix. As per the appellant's submission, *Re Jones* is an immigration case dealing with the cancellation of a visa whereby there is no analysis of any statutory provision equivalent to s 85 of the CA 2016 nor any finding on what constitutes a 'direction to the contrary' to waive the shareholders' pre-emptive rights. The excerpts from the Singapore High Court in *Re Great Eastern Hotel* at 287 [48], [49] and [50] were quoted in particular, by counsel for the first, second and 16 respondents submitting that by analogy, a 'direction to the contrary' under article 11 does not require any specific form. With respect, the excerpts from *Re Great Eastern Hotel* have to be seen in its context as highlighted by counsel for the appellant as follows: At the time the impugned resolution was tabled, the shareholders were already aware that: (i) a prior shareholder resolution had been passed to approve a loan agreement which terms of repayment include an allotment of shares; and (ii) a specific resolution precluding the requirement to obtain shareholder approval before the issuance of new shares had also been passed. B C D E

[27] We find that the placement resolution cannot displace the appellant's statutory pre-emptive rights to the placement shares which breach is oppressive because it has resulted in: (i) the unjustified dilution of the appellant's shareholding in Apex Equity because an additional 20 million new shares have been issued to the outsiders despite the statutory safeguard in s 85 of the CA 2016, where the legislative intent was to 'maintain the relative voting and distribution rights of those shareholders.'; and (ii) the loss of opportunity to enhance the appellant's shareholding in Apex Equity by subscribing for part of the placement shares. F G

SECTION 75 OF THE CA 2016

[28] The respondents also argue there is allegedly no breach of s 85 of the CA 2016 as s 75 of the CA 2016 grants directors the power of allotment in respect of the placement shares. Section 75 of the CA 2016 (material part) provides: H

> Exercise of power of directors to allot shares or grant rights
>
> (1) Unless the prior approval by way of resolution by the company has been obtained, the directors of a company shall not exercise any power — I
>
> (a) to allot shares in the company;
>
> ...
>
> (d) to allot shares under an agreement or option or offer.

A (2) Subsection (1) shall not apply to —

(a) an allotment of shares, or grant of shares, under an offer made to the members of the company in proportion to the members' shareholdings;

B **[29]** It is our respectful view that the respondents' contention is untenable in light of the reasons proffered by the appellant that the general power of allotment under s 75 of the CA 2016 cannot be used by the respondents to bypass the safeguards under s 85 of the CA 2016. Firstly, s 85 of the CA 2016 is not subjected to s 75 of the CA 2016 as the former is only subjected to the C constitution, which makes no reference to the latter. Secondly, the express wording of s 75 states that the directors 'shall not exercise any power to allot shares in the company' unless the prior approval by way of resolution by the company has been obtained. Thirdly, the directors of Apex Equity have always accepted that prior approval is required because in previous annual general D meetings, shareholder approval was always sought to empower the directors to allot and issue new shares up to an amount not exceeding 10% of Apex's issued share capital (AGM Minutes of 28 May 2018, item Resolution 11).

[30] Therefore, with respect, we are of the view that the learned judge erred E when he found that none of the allegations of oppression had been made out in respect of the appellant's contention that there was a contravention of s 85of the CA 2016. In the circumstances, we find there is merit in the appellant's submission that the invalid offer and issuance of the placement shares under the subscription agreements constitute an unfairly prejudicial conduct within F the meaning of s 346 of the CA 2016. In *Re a company (No 005134 of 1986), ex parte Harries* [1989] BCLC 383, Peter Gibson J held at p 396 as follows:

> It was conceded on behalf of Mr Rees that the allotment was invalid because of s 17 of the Companies Act 1980. In broad terms that section provides that (save for exceptions immaterial here) a company is prohibited from allotting new shares G unless it has offered those shares to existing shareholders in proportion to their holdings and on the same terms, and that the offer must be served on each shareholder. Counsel for the respondents submitted that a contravention of s 17 did not necessarily amount to unfairly prejudicial conduct. That may well be right in the case of a merely technical beach but it cannot be right in the case of a substantial H contravention of the section, which seems to me to embody in statutory form ordinary and basic notions of fairness as between shareholders inter se and governing those with the power to allot shares. There can be no doubt that in the present case there was a substantial contravention of s 17. I go further: it seems to me clear beyond argument that the allotment was invalid as being for an improper purpose, namely to increase Mr Ree's holding and to reduce Mr Harrie's holding I and with an improper motive, namely to reward himself.

[31] We are of the view that the appellant has been oppressed given our finding that that there has been an unjustified dilution of the appellant's shareholding in Apex Equity since the placement shares have been offered to

outsiders. It has been held by this court in *Soo Boon Siong @ Saw Boon Siong v Saw Fatt Seong and Soo Hock Seang (as estate representative Soo Boon Kooi@ Saw Boon Kooy (deceased)) & Ors* [2008] 1 MLJ 27 at p 48 approving the commentary made in *Chan & Koh on Malaysian Law, Principle & Practice* (2nd Ed, 2006) as follows:

> [40] ... Section 132D is inspired by the Jenkins report where it was recommended that the directors should not have the power to issue any shares in the original or any increased capital of a company without the prior approval of the company in general meeting. The Jenkins report observed that the directors' unfettered discretion to issue equity shares had not always worked to the advantage of the members. *There were cases where shares were issued for cash below their market value to other than the existing members. The effect was to dilute the equity capital, 'at the expense of the existing shareholders, for the advantage of the newcomers*. (Emphasis added.)

[32] The respondents argue that the appellant did not dispute the fact that capital was required to be raised to finance the proposed merger exercise. The respondents relied on the case of *Seah Eng Toh Daniel & Anor v Kingsley Khoo Hoi Leng & 3 Ors* [2015] MLJU 2353 at para [34] which cited with approval the case of *Howard Smith Ltd v Ampol Petroleum Ltd and others* [1974] AC 821 at p 832 for the proposition that: (i) the raising of finance is a matter of management within the responsibility of the directors; and (ii) it would be wrong for the court to substitute its opinion for that of the management or question the correctness of the management's decision. Counsel for the appellant in rebuttal submits that the management powers of directors to raise fund cannot be extended to a breach of or override the statutory safeguard afforded under s 85 of the CA 2016. We have no reason to disagree with the appellant's submission and agree that the respondents' reliance on *Seah Eng Toh Daniel* and *Howard Smith* are of no relevance as these cases do not concern a denial of pre-emptive rights to new shares.

CONTRAVENTION OF S 223 OF THE CA 2016

[33] Section 223 of the CA 2016 provides:

> 223 Approval of company require for disposal by directors of company's undertaking or property.
>
> (1) Notwithstanding anything in the constitution, *the directors shall not enter or carry into effect any arrangement or transaction* for —
>
> (a) the acquisition of an undertaking or property of a substantial value; or

A (b) the disposal of a substantial portion of the company's undertaking or property unless —

(i) *the entering into the arrangement or transaction is made subject to the approval of the company by way of a resolution*; or

B (ii) *the carrying into effect of the arrangement or transaction has been approved by the company by way of a resolution*. (Emphasis added.)

[34] The appellant's position is that the HOA, the BMA and the subscription agreements form one composite transaction as all three C agreements are required to implement the proposed merger exercise. In this regard, the appellant submits that the respondents have contravened two separate and distinct restrictions in s 223 of the CA 2016 namely:

(a) the HOA, being the entry of the proposed merger exercise, did not D contain any provision subjecting it to shareholder approval; and

(b) the BMA, which carries into effect the proposed merger exercise, was executed without prior shareholder approval.

[35] The respondents, however argue that was no breach of s 223 of the CA E 2016 because:

(a) the HOA did not commit parties to enter into the BMA or the proposed merger exercise;

(b) the HOA provided for a condition precedent requiring for shareholder F approval to be obtained; and

(c) the passing of the merger resolution, subsequent to the execution of the HOA and the BMA is sufficient to comply with s 223 of the CA 2016.

G **[36]** Upon a reading of s 223 of the CA 2016, the two separate and distinct restrictions on the directors under s 223 of the CA 2016 are:

(a) to enter into an arrangement or transaction which has to be made subject to and/or contain a condition precedent for shareholder approval in in conformity with s 223(1)(b)(i); and H

(b) to carry into effect an arrangement or transaction, of which prior shareholder approval must first be obtained in conformity with s 223(1)(b)(ii).

I **[37]** There is force in the appellant's contention that the HOA, the BMA and the subscription agreements form one composite transaction as all three agreements are required to implement the proposed merger exercise (see *Sri Kelangkota-Rakan Engineering JV Sdn Bhd & Ors v Arab-Malaysian Prima Realty Sdn Bhd & Ors* [2001] 1 MLJ 324 (FC) at p 330 I); *Paragon Union Bhd*

v Prestamewah Development Sdn Bhd & Anor and another appeal [2018] 4 MLJ 307 (CA) at p 326 F to 327 A–D).

[38] In amplification of para 34 above, we find a perusal of the following relevant extracts from the HOA and the BMA undoubtedly:

(a) demonstrate that the HOA is the starting point of the proposed merger exercise:

> [1] Background
>
> *The parties are desirous of merging their respective business via the transfer by [Mercury Securities] of the Business* ... as a going concern together with the Business Assets ...and the Business Liabilities ... to [the Company] ... *by executing a Business Merger Agreemen*t ('Agreement').
>
> ...
>
> Execution of the Agreement ...
>
> *The parties shall* within three (3) months from the date of this HOA or such other timeframe as may be mutually agreed in writing between the parties, *execute the Business Merger Agreement* upon the terms and conditions as set out herein and such other terms to be mutually agreed upon. (Emphasis added)

All the salient terms of the proposed merger exercise, including the purchase consideration of RM140m and the business to be acquired ('transfer business') are encapsulated in the HOA.

(b) the proposed merger exercise was then carried into effect by the execution of the BMA as captured in the Recital therein as follows:

> *Pursuant to the Heads of Agreement dated 21.9.2018 ('HOA')* entered into between Mercury and Apex, *the parties thereto have agreed to merge their respective businesses via the transfer of Mercury to JF Apex the whole of the Business* (as defined therein) as a going concern together with the Assets (as defined herein) and the Liabilities (as defined therein). (Emphasis added.)

(c) the BMA was made inter-conditional with the subscription agreements as provided in cl 4.4 of the BMA as follows:

> The Proposed Merger is inter-conditional with the Private placement and if for any reason the Private Placement is aborted or terminated, this Agreement will ipso facto of such abortion or termination also be rescinded or terminated as the case may be or vice versa.

(On the inter-conditionality, see also cl 4.1 of the subscription agreements.)

[39] Transposing the requirements of s 223(1) of the CA 2016 which we have alluded in para 36 above to the factual matrix of the present appeal, it means that:

A (a) the HOA (being the starting point and/or the entering into of the merger exercise) has to be made subject to and/or contain a condition precedent for the approval of the shareholders of the Company (Apex Equity); and

B (b) the implementation and/or the carrying into effect of the HOA (being the execution of the BMA) requires the prior approval of the shareholders of Company (Apex Equity).

[40] The rationale behind the construction that has been accorded above to C s 223 of the CA 2016 is fortified by looking at the legislative change made to reintroduce a restriction to the 'entering into' of an acquisition has to contain a condition precedent for shareholder approval in s 233 of the CA 2016. This can be gleaned from a judgment of this court in *Pioneer Haven Sdn Bhd v Ho Hup Construction Co Bhd & Anor and other appeals* [2012] 3 MLJ 616 at paras D [113]–[118] per Zainun Ali JCA (as she then was). Prior to 2007, s 132C of the CA 1965 contained a restriction which stipulated that the directors shall not 'execute' any acquisition without shareholder approval. The restriction on 'executing' an acquisition was removed via amendment Act A 1229/07 to CA 1965. The words 'or execute' in s 132C(1) of the CA 1965 (prior to 2007 E amendment) have been deleted as 'the intention of the legislation is to restrict the operation of the section *to a situation where the directors are carrying into effect the impugned transaction, as opposed to merely entering into it by executing an agreement*'. To reiterate, this restriction to the 'entering into' of an acquisition was reintroduced in s 223 of the CA 2016 in the manner we have F alluded above.

[41] In *Pioneer Haven*, the Court of Appeal had emphasised on the mischief which s 132, CA 1965 seeks to avoid is as follows:

> G [118] One might ask: what is the mischief which s 132C seeks to avoid? Reading the said section as a whole, it is clear that the mischief which s 132C was enacted to prohibit, was the parting by the company of any of its substantial assets without approval of the shareholders at general meeting. Section 132C makes it incumbent upon the directors and the company to inform the shareholders of any intention to carry into effect any transaction whereby any substantial assets of the company was H to be taken out of the company. This duty is indirectly imposed by requiring shareholders' approval before such transaction is carried into effect.

[42] We are incline to agree with the submission of counsel for the appellant that with the reintroduction of the 'entry' restriction, the analysis of Zainun Ali I JCA in *Pioneer Haven* must necessarily be extended to mean that the directors have an incumbent duty to inform shareholders of any intention to both 'enter into' and 'carry into effect' an acquisition of substantial assets. Support for such a construction is also drawn from the case of *Smithton Ltd (formerly Hobart Capital Markets Ltd) v Naggar* [2015] 1 WLR 189 at p 206 where the English

Court of Appeal observed that the requirement under s 190 of the English Companies Act 2006, that the company 'may not enter into an arrangement … unless the arrangement has been approved by a resolution of members.' is a question which must be asked on the basis of the arrangement at its inception. Although s 190 is not in para materia with s 223 of the CA 2016, but the words 'may not enter' in s.190 is similar to s 223 of the CA 2016 which provides that the directors shall not 'enter in' without being made subject to the approval of the company.

[43] In light of the explanation above of the construction of s 223(1) CA 2016, we are therefore of the view that the respondents' contentions adopted by the learned judge cannot be sustained, namely:

(i) for the purpose of satisfying proviso (i) of s 223(1) of the CA 2016, it is sufficient that the entering into of the arrangement or transaction is 'made subject to the approval of the company by way of resolution.' The learned judge adopted the phrase to mean that shareholders' approval must be specified as a condition precedent to any arrangement or transaction of substantial value (para 54 grounds of judgment); and

(ii) proviso (i) and (ii) of s 223(1) of the CA 2016 are separated by the word 'or' which connotes that s 223(1) is satisfied if either one of the conditions in the proviso is fulfilled. The learned judge held the restrictions in s 223(1) of the CA 2016 should be read disjunctively in that it suffices if either of the limbs under s 223(1) of the CA 2016 are satisfied.

WHETHER HOA CREATED BINDING AND ENFORCEABLE OBLIGATION

[44] The respondents argue that the HOA did not create binding and enforceable obligation. With respect we are unable to agree with the respondents' submission. From a perusal of the learned judge's grounds of judgment particularly, para 58(b), the learned judge held the HOA to be legally binding through his findings that 'the [HOA] was expressed to be legally binding …, and imposed an obligation on the parties to utilise their efforts to finalise and execute the [BMA]'. His Lordship however found that the HOA 'did not have the effect of committing the parties to the sale and purchase of the business … this did not mean that the [HOA] created enforceable obligations for the sale and purchase of Mercury's business … Thus in relation to the sale and purchase of the business, the [HOA] merely constituted an agreement to agree, and would not be enforceable as contractual rights or obligations'.

[45] With respect to the learned judge, contrary to his findings, we find as the appellant correctly submits, it is from the very terms of the HOA itself that

it is evident that the obligation to enter into the BMA and/or the proposed merger exercise was legally binding and enforceable. Our reasons are as follows:

(a) the HOA was expressly stated to be legally binding and enforceable in the beginning (cl 1.2), 'Pending the execution of the Agreement [BMA], the parties agree that the [HOA] shall be legally binding on them and shall be enforceable in accordance with the terms therein'. and at the last para of the HOA (clause 2), which again repeated that 'the parties hereby agree that the terms and conditions herein shall be legally binding on them'; and

(b) the primary terms of the HOA obligated the parties to execute the BMA within three months from the date of the HOA. Its express terms provide that 'the parties shall within 3 months from the date of the HOA ... execute the [BMA] upon the terms and conditions set out herein'.

[46] There was a suggestion from the respondents that there was no finality in the HOA because there were additional terms, including the totality of business assets/liabilities of Mercury Securities, which still needed to be worked out during the exclusivity period in the HOA. In our judgment there is no merit in such a submission of the respondents given the time honoured principle that where parties have entered into a contract to acquire or purchase and have agreed to the principal terms, such obligation is enforceable irrespective whether further terms will be incorporated in a subsequent agreement. In *Daiman Development Sdn Bhd v Mathew Lui Chin Teck & anor appeal* [1981] 1 MLJ 56 wherein the Privy Council recognised that a simple 'booking proforma' for the purchase of a property (which identifies the parties and specifics of the property to be bought and its price) can be enforced even when a further agreement with additional terms has yet to be executed. At p 61, the Privy Council, among others, opined as follows:

> Once it is decided that the promise to purchase was not subject to contract the obligation of Clause 1 is to sign a contract of sale which implements a sale for which agreement has already been made. But the question of what may properly be included in the contract of sale can be left for judicial decision, if occasion should arise.
>
> In the result, therefore, in their Lordships' view the *pro forma* cannot be construed so as to treat its terms as contractually ineffective until some further agreement had been made by the parties. Nor can it properly be said that the agreement contained in the *pro forma* was inchoate for want of consensual definition of the terms and conditions to be inserted in the contract of sale.

The principles on the formation of contract propounded in *Daiman* case was affirmed and approved by the Federal Court in *PJD Regency Sdn Bhd v Tribunal Tuntutan Pembeli Rumah & Anor and other appeals* [2021] 2 MLJ 60; [2021] 2 CLJ 441.

[47] On the facts of the present appeal, we observed all the salient terms of the BMA have been agreed as per cl 2 of the HOA, including the purchase consideration of RM140m, the business to be acquired and the duration and term of the HOA. In our judgment, upon the terms of the HOA, it has been expressly intended by the parties there was to be a legally binding and enforceable agreement and the respondents' argument on the additional terms, if any which may be negotiated during the exclusivity period, it is but a mere expression of the desire of the parties as to the manner in which the transaction already agreed to will in fact go through, and it is not a condition or term of the bargain whereby there is no enforceable contract because the condition is unfulfilled (per Abdul Hamid FJ (as he then was) at p 48 C–E right column in *Lim Keng Siong & Anor v Yeo Ah Tee* [1983] 2 MLJ 39 with reference to an exposition by Mr Justice Parker in *Von Hatzfeldt-wildenburg v Alexander* [1912] 1 Ch 284 at pp 288–289).

[48] On this note, we agree with the submission of the appellant that the issue of the totality of the business assets and liability is but a red herring given that even in the BMA, the final quantum of the business assets and/or liabilities is still subject to qualifications and has yet to be fully ascertained. However, since this issue does not impact the enforceability and finality of the BMA, the respondents, rightly so cannot now claim that the finality of the HOA is somehow affected.

[49] With respect to the learned judge, in our opinion, the 'commercial reality' interpretation cannot be sustained for the following reasons. Contrary to His Lordship's findings that prior shareholders' approval cannot be realistically obtained due to the requisite secrecy and confidentiality of the proposed merger exercise, we find on the facts of this present appeal: (i) there was no secrecy and/or confidentiality to the transaction as all the principal terms of the proposed merger were extensively canvassed in the HOA and was announced to Bursa Malaysia (21 September 2018) about three months prior to the execution of the BMA (18 December 2018); and (ii) there was no impediment be it, by reason of secrecy, confidentiality or otherwise, for the company (Apex Equity) and/or its directors to seek the approval of its shareholders prior to the execution of the BMA.

WHETHER HOA CONTAINS A CONDITION PRECEDENT FOR SHAREHOLDER APPROVAL

[50] The respondents argue that s 223(1) of the CA 2016 would be satisfied if the entering into of the HOA was made subject to the shareholders' approval as required under s 223(1)(b)(i) which was satisfied by referring to cl 2 of the HOA under the heading 'Conditions Precedent' that 'The obligations of the parties to complete all transactions contemplated herein ie, the proposed

merger and proposed private placement were conditional upon, inter alia, the approval of shareholders of (Apex Equity) for the transaction contemplated in the BMA being obtained (including, without limitation) for the proposed private placement ('PLC shareholders approval').

[51] We cannot but agree with the appellant's submission that the aforesaid submission is factually incorrect because the 'condition precedent' referred to by the respondents does not form part of the terms but is instead one of the salient terms of the proposed merger exercise which is to be inserted in the BMA. Further, the respondents and in fact the learned judge were cognisant of the fact that there was no condition precedent in the HOA because the HOA has since been carried into effect by the execution of the BMA, the terms and conditions of which upon execution supersedes the terms of the HOA, prior to the passing of the merger resolution.

WHETHER THE PASSING OF THE MERGER RESOLUTION CURES THE CONTRAVENTION OF S 223 OF THE CA 2016

[52] It bears repeating that the appellant's complaint is that there are two separate and distinct restrictions in s 223 of the CA 2016 namely:

(a) the 'entering into' of the acquisition via the HOA was not subjected to shareholder approval: and

(b) the 'carrying into effect' of the acquisition via the BMA was executed without prior shareholders' approval.

[53] The appellant submits that the passing of the merger resolution on 19 June 2019 after the event and subsequent to the breaches of s 223 of the CA 2016 cannot cure such breaches. We have stated the reasons for finding that there are breaches of s 223(1) of the CA 2016 above. In the circumstances we find there is merit in the appellant's submission for the following reasons:

(a) the HOA which has been completed on 18 December 2018 did not contain a condition precedent for shareholder approval as held by this court. Therefore, the merger resolution cannot ex post facto allow for the inclusion of such condition precedent after the completion of the HOA; and

(b) the BMA required prior shareholder approval before it was executed on 18 December 2018. Therefore, a shareholder approval via the merger resolution obtained six months later on 19 June 2019 cannot cure this transgression which had already occurred.

WHETHER THERE IS ABANDONMENT OF CONTENTION ON REVERSE TAKE-OVER

[54] The respondents submit that the appellant had abandoned its contention that the proposed merger exercise was designed to facilitate a covert reverse take-over of Apex Equity and its subsidiaries by Mercury Securities by relying on para 8 of the grounds of judgment. The learned judge had in para 8 stated, 'The plaintiff also initially raised the contention that the proposed acquisition of the business of Mercury was a means by which Mercury together with the places would acquire control over Apex Equity, which would trigger the mandatory offer obligation under the Malaysian Code on Take-overs and Mergers 2016. This argument was however abandoned in the course of oral submissions'. The respondents argue that the appellant is estopped from raising this ground before this court as it was never ventilated before the High Court and to raise the same would be an abuse of process on the part of the appellant.

[55] With respect, in our view the respondent's submission is flawed as the High Court's finding on abandonment is misconceived. Based on the relevant portion of the notes of proceedings submitted by the appellant, we agree that the appellant counsel sought to make the following points at the High Court:

(a) the appellant did not need to show that parties are acting in concert in order to demonstrate that there was unfair prejudice;

(b) the prejudicial effect to the appellant is that it was Mercury Securities who identified and selected the placees; and

(c) the appellant was not seeking orders to compel a mandatory general offer pursuant to the Capital Markets and Services Act 2007.

[56] The above points coupled with the fact that the said issue was pleaded in para 17 of the amended memorandum of appeal dated 21 November 2020 to our mind are indicative that there is no abandonment of the said issue by the appellant.

DENIAL OF STATUTORY RIGHT TO VOTE

[57] The respondents in submission state that even assuming that s 223(1) requires prior shareholders' approval to be obtained before the entering of the BMA, it is evident that Apex Equity would have arrived at exactly the same position had it sought the shareholders' approval prior to the entering into the HOA or BMA and there cannot conceivably be any prejudice to the appellant. The learned judge made the same finding (para 58(d), grounds of judgment).

[58] The appellant submits the contravention of s 223 of the CA 2016 falls within the category of unfair prejudicial conduct and/or disregard of interests

as elucidated by the Federal Court in *Pan-Pacific Construction Holdings Sdn Bhd v Ngiu-Kee Corp (M) Bhd & Anor* [2010] MLJU 269 at para [26]. The appellant's position is it has been denied of its statutory right to vote and to approve the proposed merger exercise prior to the execution of the BMA.

[59] Contrary to the position held by the respondents and agreed to by the learned judge, we say His Lordship has erred for the following reasons found in the appellant's submission which we find no reason to disagree with. The said denial of the appellant's fundamental statutory right to vote provided in s 223 of the CA 2016 constitutes an oppression on the minority irrespective of whether such vote would have changed the outcome of the merger resolution (see *Lim Hean Pin v Thean Seng Co Sdn Bhd & Ors* [1992] 2 MLJ 10 at p 34 B per Edgar Joseph Jr J (as he then was)). We observed that the oppressive conduct of the denial of the appellant's right to vote assumes greater significance when the proposed merger exercise although framed as acquisition of Mercury Securities, is instead designed to facilitate a covert reverse take-over of Apex Equity and its subsidiaries, including JF Apex by Mr Chew Sing Guan and Mercury Securities. The ultimate result of the proposed merger exercise is that Mercury Securities: (i) will be the single largest shareholder in Apex Equity holding about 31% of the company's enlarged share capital; (ii) if taken in conjunction with the Proposed Placement to the ninth to 15th respondents (constituting about 6.2% of the company's enlarged share capital), who were identified by Mercury securities for the proposed merger exercise will have control of about 37.2% of Apex Equity's enlarged share capital; and (iii) will have complete control over the first respondent's group of companies as it will through its MD, Mr Chew Sing Guan, have the sole discretion to appoint the entire board of directors of the Company's subsidiaries, including JF Apex.

[60] When viewed in totality, the proposed merger exercise although couched as an ordinary merger with a private limited company (Mercury Securities) has consequences in that:

(a) on the one hand, Mercury Securities would (as a purported seller) have received a purchase consideration of RM140m; and

(b) however, although having received substantial consideration (instead of paying), Mercury Securities would have gained absolute control over the operations of the Apex Equity's group companies and control of approximately 37% without having to comply with Rule 4.01 of the Rules on Take-Overs, Mergers and Compulsory Acquisitions.

[61] The above consequences would unfairly prejudice the interests of the appellant as a member because the value of its investments in Apex Equity would have diminished substantially by (a) the loss of the purchase

consideration of RM140m to Mercury Securities; and (b) the ceding of control of Apex Equity to Mercury Securities where the company's shareholders will no longer be in a position to manage and structure the company and its group (see *Re Little Olympian Each-Ways Ltd (No 3)* [1995] 1 BCLC 636).

SHARE BUY-BACK TRANSACTION AND VALIDATION ORDER

[62] As highlighted by the appellant, the appellant's complaint is in respect of the directors' conduct in filing an application (OS 382 on 29 August 2018) pursuant to s 582(3) of the CA 2016 to validate previous share buy-back transactions undertaken by Apex Equity, which continue to be unauthorised and illegal due to the contravention of s 67 of the CA 1965 and/or s 123 of the CA 2016 which prohibits a company from purchasing its own shares. The appellant contends that the validation of these share buy-back transactions is and continues to be unlawful.

[63] The respondents' arguments in response are essentially the following:

(a) s 582 of the CA 2016 allows for the validation of breaches of the Companies Act and therefore the illegality surrounding the share buy-back back transactions have been rectified by the validation order. In addition, there is no necessity to amend the Company's M&A to allow share buy–back prior to obtaining the validation order because such amendment takes place prospectively;

(b) there is acquiescence and/or delay by the appellant in seeking to nullify the validation order; and

(c) the relief formulated by the appellant in respect of share buy-back is unsuitable and is commercially impractical.

[64] Section 67 of the CA 1965 and/or s 123 of the CA 2016 specifically prohibits a company from purchasing its own shares; the only exception to this restriction is if express authority is provided by the company according to s 67A of the CA 1965 and/or s 127 of the CA 2016. It is not in dispute that the Company M&A did not contain any authorisation for the conduct of share buy-back transactions. Thus, all the share buy-back transactions carried out by Apex Equity between 2005 to 2017 were unlawful and in contravention of CA 1965 and/or CA 2016. This was acknowledged by the learned judge.

[65] The M&A remained unamended to date because the directors' subsequent proposal to adopt a constitution which authorises share buy-back was rejected by the shareholders during the EGM on 19 June 2019. Section 582 of the CA 2016 only caters for orders to validate 'defect, irregularity or deficiency'. As such, the previous share buy-back transactions continue to be illegal notwithstanding the validation order due to its

contravention of s 67 of the CA 1965 and/or s 123 of the CA 2016.

[66] In submission the appellant ventilates that the conduct of the directors in obtaining the validation order on behalf of the company is unlawful and constitutes an act which is unfairly prejudicial to the appellant and the other shareholders of the company. In this regard we refer to the case of the *Australian Securities Commission v Multiple Sclerosis Society of Tasmania* (1993) 10 ACSR 489 where at p 507 lines 25–30, the Supreme Court of Tasmania ruled:

> ... An act which is otherwise prejudicial to a member may more readily be described as being unfairly so if it is an unlawful act. An act which is discriminatory against a member may more readily be said to be unfairly so if it is an unlawful act. *An act may more readily be said to be contrary to the interests of the members as a whole if it is an unlawful act. Unlawfulness may more readily justify intervention under s 346.*
>
> Instead, the circumstances surrounding this issue show that the Directors' act of filing of the Validation Proceedings, without first amending the M&A, is a blatant disobedience of the M&A and is oppressive of the appellant. (Emphasis added.)

Section 260 of the Corporations Law in the case of *Australian Securities Commission v The Multiple Sclerosis of Tasmania* is similar to s 346 of the CA 2016.

[67] We find there in merit in the submission of the appellant that the learned judge fell into error when His Lordship stated that, 'There was no suggestion at all that the share buy-back transactions were undertake in wilful disobedience of the memorandum and articles of association.' To our mind, it is but otherwise because the circumstances show as acknowledged by the learned judge that, 'It was the [appellant] who discovered the memorandum and articles of association of Apex Equity did not permit share buy-back transactions. The [appellant] brought this to the attention of the management of Apex Equity'. Unfortunately, the learned judge stopped short of that in failing to find that it was the Directors' act of filing the Validation Proceedings without first amending the M&A is a blatant disregard of the M&A and is oppressive of the appellant.

[68] Further, at the time the validation proceedings were filed (30 July 2018) there is contemporaneous evidence as in the minutes of the 2018 AGM (28 May 2018) that the shareholders of Apex Equity refused to authorise the Company to carry out further share buy-back transactions after being appraised of the illegality surrounding the same. As such we agree with the submission of the appellant that having regard to the wishes of the shareholders, the Directors ought to have obtained the consent and authority of the shareholders prior to the filing of the Validation proceedings instead of filing without the prior knowledge or approval of the shareholders. This in our view has resulted in unfair prejudice to the appellant as its' substantive rights were impinged in the following manner:

(a) it was denied the opportunity to participate in the validation proceedings and to inform the court that:

(i) the M&A was not amended to incorporate the necessary authorisation for the company and the relevant Board of Directors to carry out share buy-back transactions and that the transactions sought to be validated continue to be unlawful and/or illegal. The resulting impact would mean that the court has no jurisdiction to rectify and/or validate such continuing unlawful and/or illegal transactions. A case in point is *Holman et Al' v Johnson, alias Newland* (1775) 98 ER 1120 at p 1121, when the court stated:

> If, from the plaintiff's own stating or otherwise, the cause of action appears to arise es turpi causa, or the transgression of a positive law of this country, there the court says that he has no right to be assisted.

(b) it continues to be a shareholder in a company in contravention of written law ie, of s 67 of the CA 1965 and/or s 123 of the CA 2016. This in turn shows that the 'affairs of the company' have and/or continue to be conducted in a manner in disregard of and/or is unfairly prejudicial to the interests of the appellant as a member of the Company. A case which is of relevance is *Fowler v Gruber* [2010] 1 BCLC 563 at [136].

[69] We agree with the submission of the appellant that there is no acquiescence by the appellant in seeking to set aside the validation order for the following reasons:

(a) there cannot be any acquiescence against a breach of statute or an illegal act which in effect is the substance of the validation order. A case in point is *Joan Fung @ Joan Fung Nyuk Lee v Allianz General Insurance Co (M) Bhd* [2011] 6 MLJ 805 at [36] where the High Court held that estoppel, waiver or acquiescence cannot prevail against a statute of public policy or to protect against an illegality. The principle was ruled in the context of s 9 of the Employees Provident Fund Act 1951 and/or s 47 of the EPF Act 1991 whereby it is expressly provided that a breach of the provisions is illegal and a punishable offence. We are of the view that by analogy, the said principle can apply to the issue at hand in the present appeal; and

(b) the appellant's conduct in seeking to nullify the validation order in this OS is a clear demonstration that there is no acquiescence as alleged.

[70] We also find there is no delay by the appellant in seeking to nullify the validation order because the OS was filed on 2 February 2019, a few months after the validation order was granted on 29 August 2018. We are of the view that it cannot be said to be inordinate delay given that the relevant cause papers

were not served on the appellant and that there was about one month delay of the public announcement of the validation order.

[71] The respondents argue that the order sought in respect of the validation ought not to be granted by reason of the fact that it is practically impracticable. This was the finding of the learned judge after having acknowledged that 'there had been a deprivation of the plaintiff of its right to object to the application for validation' (para 36 of the grounds of judgment). With respect, such an argument is untenable because:

(a) this court cannot stand and allow wrongful acts to go unpunished since the court finds the respondents are guilty of oppressive acts; and

(b) even if the relief formulated by the appellant is unsuitable, this court has an unfettered discretion to make any order as the court deems fit as empowered by s 346(2) of the CA 2016. A case in point is a decision of this court in *Lee Yee Wuen v Lee Kai Wuen & Ors* [2020] MLJU 1902. We endorse the views expressed in paras 62 and 108.

[72] The issue of excessive costs raised by the appellant as a ground of appeal is no longer relevant since our findings are made in favour of the appellant.

CONCLUSION

[73] We have perused the records of appeal and considered the respective submissions, both written and oral. For all the foregoing reasons we find there is merit in the appeal which warrants appellate intervention. We unanimously make the following decision and order accordingly:

(a) the appeal is allowed. In respect of the OS (Bahasa Malaysia version), we make the following order as follows:

(i) prayer 1 is allowed subject to the deletion of the words '('Pengarah-Pengarah Semasa' tersebut)';

(ii) prayer 2 is allowed;

(iii) prayer 3 is allowed;

(iv) prayer 4 is allowed subject to the modification of the subject shares be sold in the open market by the first respondent and its directors within a period of six (6) months of this order;

(v) prayer 5 is allowed subject to the modification that the words 'Pengarah-Pengarah Semasa' be substituted with 'Defendan-Defendan Ketiga hingga Kelapan';

(vi) prayer 6 is not allowed;

(vii) prayer 7 is allowed;

(viii) prayer 8, no order is made (it is not required);

(ix) prayer 9 is allowed (amendment of the word 'langgan' with 'langganan';

(x) prayer 10, no order is made (it is not required);

(xi) prayer 11 is allowed; and

(xii) prayer 12 is allowed to be modified as 'parties are at liberty to apply.';

(b) in relation to prayer 11, the order in respect of costs is as follows:

(i) costs of RM415,000 ordered by the High Court is to refunded by the respective respondents to the appellant's solicitors within two months from this order;

(ii) costs of RM100,000 here and below is to be paid by first, second and 16 respondents;

(iii) costs of RM16,000 here and below is to be paid by third to 7th respondents respectively;

(iv) costs of RM10,000 here and below is to be paid by the eighth respondent; and

(v) costs of RM 10,000 here and below is to be paid by each set of solicitors for ninth and 12th, 10th, 11th, 13th, 14th and 15th respondents;

(c) the order of the High Court dated 7 August 2019 is hereby set aside; and

(d) costs is subject to payment of allocatur.

Appeal allowed, High Court's decision set aside.

Reported by Ashok Kumar